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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 DESHONE H.,

9 Plaintiff,

10 v.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

CASE NO. C19-5515 BAT

**ORDER REVERSING THE  
COMMISSIONER AND REMANDING  
FOR FURTHER ADMINISTRATIVE  
PROCEEDINGS**

13 Plaintiff seeks review of the denial of his application for Supplemental Security Income.  
14 He contends the ALJ erred by rejecting his testimony and three medical opinions. Dkt. 12. As  
15 discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the  
16 matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

17 **DISCUSSION**

18 **A. Plaintiff's Testimony**

19 Plaintiff testified he frequently gets irritated and angry and isolates himself. Tr. 153.  
20 Racing thoughts prevent him from concentrating. Tr. 153-54. He gets anxiety and panic attacks.  
21 Tr. 159. An ALJ may "reject [a claimant's] testimony only upon (1) finding evidence of  
22 malingering, or (2) expressing clear and convincing reasons for doing so." *Benton ex rel. Benton*  
23 *v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). Here, the ALJ found evidence of malingering.

1 AR 31-32. Plaintiff argues the malingering “tended to establish the character of Plaintiff’s  
2 mental impairments.” Dkt. 17 at 8. Plaintiff’s interpretation of the medical evidence does not  
3 square with the plain fact there is evidence of malingering. The Court thus cannot say the ALJ  
4 unreasonably discounted Plaintiff’s testimony based upon malingering. The Court accordingly  
5 affirms the ALJ’s assessment of Plaintiff’s testimony.

## 6 **B. Medical Opinions**

7 Plaintiff contends the ALJ erred by rejecting the opinions of examining psychologist  
8 Terilee Wingate, Ph.D., non-examining psychologist Faulder Colby, Ph.D., and treating therapist  
9 Ramona Marshall, M.A. Dkt. 12 at 4-10. In general, the ALJ must give specific and legitimate  
10 reasons for rejecting an examining doctor’s opinion that is contradicted by another doctor.  
11 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). An ALJ “may reject the opinion of a non-  
12 examining physician by reference to specific evidence in the medical record.” *Sousa v.*  
13 *Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998). An ALJ may reject the opinion of a non-  
14 acceptable medical source, such as a therapist, by giving reasons germane to the opinion.  
15 *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014).

### 16 *I. Terilee Wingate, Ph.D.*

17 In 2013, Dr. Wingate examined Plaintiff and opined he had marked limitations in  
18 maintaining punctual attendance, communicating and performing effectively, maintaining  
19 appropriate behavior, and completing a normal work day and work week without interruptions  
20 from psychologically based symptoms. Tr. 853. Dr. Wingate’s mental status examination  
21 findings were within normal limits except for dysphoric mood and blunted affect, and a  
22 malingering assessment showed that “memory malingering is likely.” Tr. 856, 854-55. In 2016,  
23 Dr. Wingate again examined Plaintiff, finding new abnormalities in fund of knowledge,

1 concentration, abstract thought, and judgment, and opined the same limitations as in 2013. Tr.  
2 1180, 1178. A malingering assessment was not performed.

3 The ALJ gave Dr. Wingate's 2013 and 2016 opinions little weight because they were  
4 inconsistent with her own and other medical findings. Tr. 34. *See Morgan v. Comm'r of Soc.*  
5 *Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999) (affirming rejection of doctor's opinion that  
6 was contradicted by her own and other medical examiners' reports). Plaintiff challenges only the  
7 rejection of Dr. Wingate's 2016 opinions.

8 a) Other Medical Findings

9 Impairments that can be "controlled effectively" by medication or treatment are not  
10 considered disabling for purposes of determining eligibility for Social Security benefits. *See*  
11 *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). However, "'doing  
12 well for the purposes of a treatment program has no necessary relation to a claimant's ability to  
13 work or to her work-related functional capacity.'" *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th  
14 Cir. 2014) (quoting *Hutsell v. Massanari*, 259 F.3d 707, 712 (8th Cir. 2001)).

15 The ALJ found Dr. Wingate's opinions were contradicted by evidence that Plaintiff's  
16 symptoms were stable with treatment. Tr. 34. However, the records the ALJ cited do not show  
17 effective control of Plaintiff's mental health impairments. In visits between March 2014 and  
18 March 2016, Plaintiff consistently reported being down, depressed, or hopeless, and he was  
19 frequently described as depressed or with a flat affect. Tr. 984-1005. In August 2014 he  
20 reported that his mental health medications were "not working" and caused side effects such as  
21 dizziness. Tr. 993. A September 2015 record the ALJ cited shows that Plaintiff likely has  
22 "foundational psychiatric issues," although he may also be malingering. Tr. 1174. A September  
23 2016 record shows Plaintiff felt a recent medication increase was helpful, but only for the past

1 two days. Tr. 1202. By January 2017, Plaintiff reported frustration, side effects, and “a  
2 significant increase in s[ymptoms]” of anxiety and agitation with recent medication changes. Tr.  
3 1216, 1215. He sought inpatient treatment, and his therapist agreed to check on bed availability.  
4 Tr. 1216. Plaintiff was hospitalized in January 2017 for suicidal ideation and depression, again  
5 in April 2017 for bipolar disorder, and again in May 2017 for “increasing depressive symptoms.”  
6 Tr. 1248, 1279, 1265, 1240. In December 2017, Plaintiff’s treating provider wrote despite “a  
7 complex medication regime,” he “continues to struggle [with] significant [symptoms] of PTSD  
8 and bipolar disorders. He has decompensated about 3 times in past 6 [months] and has used  
9 drugs and [alcohol] when he does. He has been hospitalized 2-3 times in past 6 [months].” Tr.  
10 1593. Plaintiff was hospitalized yet again in December 2017. Tr. 1682. Given this record,  
11 periodic notations of normal mood and affect during physical health appointments, or that  
12 Plaintiff was “handl[ing] stress much better,” are not substantial evidence supporting the ALJ’s  
13 finding that Plaintiff’s impairments were well controlled with medication. Tr. 1648. The ALJ  
14 also cited several instances where Plaintiff reported feeling better after medication changes. *See*,  
15 *e.g.*, Tr. 1654, 1679. But the fact Plaintiff’s medications were changed so frequently  
16 demonstrates that stable improvement remained elusive. Improvement with medication was not  
17 a specific and legitimate reason to discount Dr. Wingate’s opinions.

18           b)       Dr. Wingate’s Own Findings

19           The ALJ also discounted Dr. Wingate’s opinions because she found malingering in her  
20 2013 examination, yet still “assessed significant limitations.” Tr. 34. Dr. Wingate’s opinions  
21 clearly account for her findings. Her clinical findings showed that “memory malingering is  
22 likely.” Tr. 856. Accordingly, she assessed Plaintiff’s memory as “within normal limits,”  
23 despite the fact that he remembered none of four words after five minutes. Tr. 855. Dr. Wingate

1 clearly accounted for the malingering in reaching her conclusions. The ALJ also stated Dr.  
2 Wingate's "assessments are inconsistent with [Plaintiff's] performances during both  
3 evaluations," but does not explain how. Tr. 34. Dr. Wingate found many clinical abnormalities  
4 in her 2016 examination to support her opinions. Conflict with her own findings was not a  
5 specific and legitimate reason to discount Dr. Wingate's opinions.

6 c) Substance Abuse

7 The ALJ discounted Dr. Wingate's opinions because Plaintiff "failed to provide accurate  
8 information to the doctor regarding his ongoing substance abuse." Tr. 34. The ALJ failed to  
9 explain how knowing Plaintiff's full substance use history would alter Dr. Wingate's opinions.  
10 The only relevant information in the record is Plaintiff's treating provider's assessment that  
11 when Plaintiff decompensates, he uses drugs. Tr. 1593; *see also* Tr. 2209 ("his substance use  
12 disorders ... tend to be related to an increase in his mental health symptoms"). In other words,  
13 his mental impairments cause his substance abuse, not the reverse. Moreover, Plaintiff was in  
14 prison until just ten days before Dr. Wingate's examination. Tr. 1166. And there is no evidence  
15 that Dr. Wingate relied on a lack of substance abuse in formulating her opinions. Plaintiff  
16 reported no current substance abuse but told Dr. Wingate "[w]hile in prison he graduated from  
17 their chemical dependency program." Tr. 1176. Dr. Wingate was thus aware of substance abuse  
18 in his recent past. Inaccurate information about substance abuse was not a specific and  
19 legitimate reason to discount Dr. Wingate's opinions.

20 The Court accordingly concludes ALJ erred by discounting Dr. Wingate's opinions  
21 without a specific and legitimate reason.

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1           2.       *Faulder Colby, Ph.D.*

2           The ALJ discounted Dr. Colby's opinions for the "same reasons as those of Dr.  
3 Wingate." Tr. 35. As discussed above, the ALJ erred in rejecting Dr. Wingate's opinions and  
4 accordingly similarly erred in relying on the same reasons to reject Dr. Colby's opinions.

5           3.       *Ramona Marshall, M.A.*

6           In June 2018, Ms. Marshall opined Plaintiff's mental health symptoms had "a significant  
7 impact on his ability to function in daily life." Tr. 2208. The ALJ gave Ms. Marshall's opinions  
8 little weight as inconsistent with the medical evidence and Plaintiff's activities, and because she  
9 "failed to address" Plaintiff's substance abuse history. Tr. 35-36. The ALJ's finding Ms.  
10 Marshall failed to address substance abuse is inexplicable. Ms. Marshall addressed it directly in  
11 her opinion, stating Plaintiff's "substance use disorders ... tend to be related to an increase in his  
12 mental health symptoms." Tr. 2209. Her treatment notes further explain it is when Plaintiff  
13 decompensates that he uses drugs and then is hospitalized. Tr. 1593. Ms. Marshall, a trained  
14 medical professional, interpreted the medical evidence as showing that when Plaintiff's mental  
15 health symptoms increase, he then uses drugs. Because the ALJ's finding Ms. Marshall failed to  
16 address substance abuse was not supported by substantial evidence, it cannot be a germane  
17 reason to discount her opinions.

18           The ALJ found Ms. Marshall must have relied on Plaintiff's subjective reports because  
19 her opinions were "grossly inconsistent" with the medical evidence. Tr. 35. As discussed above,  
20 the ALJ's finding Plaintiff's mental health symptoms are well controlled with medication was  
21 not supported by substantial evidence in the medical record, and accordingly was not a germane  
22 reason to discount Ms. Marshall's opinions.

1 The ALJ cited Plaintiff's activities of spending time with his children; basic activities of  
2 daily living such as self-care, cooking, household chores, and shopping; and exercising at the  
3 YMCA. Tr. 36, 32. None of these contradict Ms. Marshall's opinions. Plaintiff sees his  
4 children "when [he is] up to it." Tr. 155. His "mood won't allow [him] to see them every day."  
5 Tr. 156. Plaintiff reported that at most he cooks "TV dinners." Tr. 484. He has lost weight  
6 because he forgets to eat. Tr. 1224. He does not shop or do chores regularly. Tr. 484-85, 158.  
7 Irregular visits to the YMCA does not contradict Ms. Marshall's opinions of significant  
8 impairments in daily functioning. Plaintiff's activities were not a germane reason to discount  
9 Ms. Marshall's opinions. The Court accordingly concludes the ALJ erred by discounting Ms.  
10 Marshall's opinions without a germane reason.

### 11 **C. Scope of Remand**

12 Plaintiff requests the Court remand for benefits or, in the alternative, for further  
13 administrative proceedings. Dkt. 12 at 12. Remand for an award of benefits "is a rare and  
14 prophylactic exception to the well-established ordinary remand rule." *Leon v. Berryhill*, 880  
15 F.3d 1041, 1044 (9th Cir. 2017). The Ninth Circuit has established a three-step framework for  
16 deciding whether a case may be remanded for an award of benefits. *Id.* at 1045. First, the Court  
17 must determine whether the ALJ has failed to provide legally sufficient reasons for rejecting  
18 evidence. *Id.* (citing *Garrison*, 759 F.3d at 1020). Second, the Court must determine "whether  
19 the record has been fully developed, whether there are outstanding issues that must be resolved  
20 before a determination of disability can be made, and whether further administrative proceedings  
21 would be useful." *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014)  
22 (internal citations and quotation marks omitted). If the first two steps are satisfied, the Court  
23 must determine whether, "if the improperly discredited evidence were credited as true, the ALJ

1 would be required to find the claimant disabled on remand.” *Garrison*, 759 F.3d at 1020. “Even  
2 if [the Court] reach[es] the third step and credits [the improperly discredited evidence] as true, it  
3 is within the court’s discretion either to make a direct award of benefits or to remand for further  
4 proceedings.” *Leon*, 880 F.3d at 1045 (citing *Treichler*, 773 F.3d at 1101).

5 The second step is not satisfied. Plaintiff simply asserts the “record is complete.” Dkt.  
6 12 at 12. But the medical opinions the ALJ erroneously rejected remain contradicted by other  
7 evidence in the record, including the opinions of the state agency doctors that Plaintiff has the  
8 mental capacity to work. *See* Tr. 186-88, 203-04. It is the ALJ’s role to resolve conflicts in  
9 medical testimony, not the Court’s on appeal. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.  
10 1995). The Court therefore concludes further administrative proceedings would be useful and,  
11 accordingly, remand for further proceedings.

## 12 CONCLUSION

13 For the foregoing reasons, the Commissioner’s decision is **REVERSED** and this case is  
14 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

15 On remand, the ALJ should reevaluate the opinions of Dr. Wingate, Dr. Colby, and Ms.  
16 Marshall, develop the record and reassess the RFC as needed, and proceed to step five as  
17 appropriate.

18 DATED this 13<sup>th</sup> day of December, 2019.

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BRIAN A. TSUCHIDA  
Chief United States Magistrate Judge  
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